UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SHIRLEY MAHONEY, Appellant, v. UNITED STATES POSTAL SERVICE, Agency.	DOCKET NUMBER SF035385C0249 DATE: JUN 15 1988

Shirley Mahoney, Oakland, California, pro se.

R. N. Davidson, San Bruno, California, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

The appellant petitions for review of the addendum decision-compliance, issued June 5, 1987, that dismissed her petition for enforcement. For the reasons set forth below, the Board GRANTS the petition, VACATES the addendum decision, and REMANDS this case to the San Francisco Regional Office for consideration of the appellant's petition for enforcement consistent with this Opinion and Order.

BACKGROUND

The appellant received an on-the-job injury on October 30, 1972, and was separated from her position with the agency on the grounds of disability on April 11, 1975. She received compensation from the Department of Labor from November 7, 1972, until January 8, 1980. By letter dated January 23, 1980, the appellant inquired about reinstatement with the agency and was sent a letter informing her to complete PS Form 2591, Application for Employment. Petition for Review File, Tab 1, Exhibit E 3. The copy of the letter submitted by the appellant contains a handwritten note that the completed application was turned in to Sharon Johnson of Employee Services. The agency contended that it did not receive a completed application. The appellant made several attempts throughout 1981 and 1982 to seek reinstatement. Ultimately, the appellant filed an appeal with the Board's San Francisco Regional Office on December 28, 1984. The Regional Office dismissed the appeal as untimely, and the appellant filed a petition for review of that initial decision. In an Opinion and Order issued July 8, 1986, the Board found good cause for the untimeliness of the petition for appeal and vacated the initial decision. *See Mahoney v. United States Postal Service*, 31 M.S.P.R. 186 (1986).

On remand, the administrative judge dismissed the appeal in an initial decision issued on October 24, 1986, (which became final on November 28, 1986.) The administrative judge stated in his initial decision that, on

October 23, 1986, the parties had advised him that the appeal had been "satisfactorily resolved" and the appellant wished to withdraw her appeal. Initial Decision at 1. At the time he issued his initial decision, the administrative judge did not have any written confirmation of the settlement or its terms. The regional office did not receive a copy of the settlement agreement and the appellant's request for withdrawal of her appeal "in its entirety" until October 27, 1986. Remand File, Vol. II, Tab 21. The agency's cover letter accompanying the settlement agreement stated that the agreement "should not be incorporated into the Board's award." *Id.* Neither the appellant nor her designated representative signed the cover letter.[1]

On April 8, 1987, the appellant hand-delivered a letter to the San Francisco Regional Office in which she requested a response to an earlier letter that she labeled "Petition for Enforcement." The appellant claimed that she had filed her petition for enforcement with the regional office on

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[1] The settlement agreement was signed by Nancy J. Miller (then the agency's representative), the appellant, and Carter Beavers, who was identified as the appellant's representative. Remand File, Vol. II, Tab 21. The record, however, contains no evidence that the appellant designated Mr. Beavers as her representative. It shows only that the appellant had designated Elaine Wallace, an attorney, as her representative. Ms. Wallace had prosecuted the appeal on the appellant's behalf until the settlement agreement was signed. Remand File, Vol. I, Tab 3. When forwarding the settlement agreement to the administrative judge, the agency included Ms. Wallace on the Certificate of Service, identified her as the appellant's representative, and excluded Mr. Beavers. Remand File, Vol. II, Tab 21.

March 15, 1987.[2] In her petition, the appellant claimed that the agency had not complied with the settlement agreement and had not intended to comply with the agreement until she initiated an inquiry, through her Congressman's office, into the agency's continued failure to reinstate her. The appellant also contended that the settlement agreement was based on fraud and/or mutual mistake. The agency responded to the petition for enforcement, alleging that the settlement agreement was not part of the record and therefore the Board could not enforce it. The administrative judge agreed with the agency's contention and dismissed the appellant's petition in the addendum decision now at issue.

In her timely petition for review of the addendum decision, the appellant alleges that the administrative judge erred in finding that the settlement agreement was not part of the record of the appeal. The appellant argues that the agreement was sent to the Board and is in the record, which she interprets as being different from the "award," from which the agency stated that the agreement should be excluded. The appellant also alleges that she had not been informed that the agreement would not be enforceable if not included in the record.

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[2] The regional office had no record of this filing and, after being so informed, the appellant filed a copy of her March 15, 1987, letter with the regional office on April 8, 1987.

In its response to the petition for review, the agency argues that the petition does not meet the criteria for review and, alternatively, that the agency complied with the terms of the agreement.[3]

ANALYSIS

As a matter of policy, the Board favors the settlement of actions between an agency and its employees. *See Social Security Administration v. Givens*, 27 M.S.P.R. 360, 362 (1985). Settlement of disputes serves to avoid unnecessary litigation and to encourage fair and speedy resolution of issues. *See Roberson v. Department of the Air Force*, 27 M.S.P.R. 11 (1985).

In this case, the administrative judge dismissed the appeal before ascertaining the terms of the agreement and before both parties indicated whether the settlement agreement would be subject to Board enforcement. In fact, neither the record nor the initial decision discloses the manner in which the parties notified the administrative judge that they had resolved their differences.

We find that it was error for the administrative judge to dismiss this appeal without documenting for the record whether the parties had reached a settlement agreement, understood the agreement's terms, and agreed whether or not the settlement agreement was to be enforceable by the Board. *Cf. Hatcher v. Department of the Army*, 11 M.S.P.R. 135, 136

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[3] We note that the attachments to the agency submission on which the agency relies to claim compliance are not in the record. Compliance File, Tab 3.

(1982) (the administrative judge erred in dismissing an appeal based on an executory settlement agreement which never became final).

In this case, the record contains no indication as to the extent that the administrative judge participated in the settlement process or whether he ensured that the parties agreed -- as the agency now contends -- that the settlement agreement was not to be enforceable by the Board. Although the agency stated in its cover letter that it wished the settlement agreement to be excluded from the Board's "award," the agency did not make explicit its intention that the settlement agreement was to be excluded from the Board's case record so as to make the agreement unenforceable through Board procedures. The agency filed a copy of the agreement with the Board even though it was not required to do so if the agreement was not to be enforceable. *See Richardson v. Environmental Protection Agency*, 5 M.S.P.R. 248, 250 (1981). The settlement agreement itself does not express the intent of the parties on the issue of its enforceability, and the record is devoid of any evidence indicating that the appellant intended that the settlement agreement would be excluded from the record.

Due to the lack of record evidence concerning the parties' intentions with regard to whether the settlement agreement was to be included in the record, we are unable to determine whether the Board has jurisdiction to enforce the

agreement. It is therefore necessary to remand this appeal to the administrative judge.

ORDER

Accordingly, the Board REMANDS this appeal to the San Francisco Regional Office for consideration of the following issues: (1) Whether the parties intended that the settlement agreement submitted to the administrative judge record was intended to be enforceable by the Board; (2) if so, whether the agreement is enforceable under *Richardson*, 5 M.S.P.R. at 250; and (3) if so, whether the agency has complied with the terms of the agreement.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.